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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, AND LOCAL UNION 2602, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Petitioners,

v.

DONALD C. FLOWERS AND KING E. JONES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Is the State statute of limitations for nonmedical malpractice the appropriate one to determine the timeliness of an action by an individual under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, alleging that a union has breached its duty to represent him fairly?

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SUMMARY OF ARGUMENT

I. A. The duty of fair representation is but the application to labor unions of the profound and pervasive principle of our law that one who undertakes to represent another must treat with him fairly and not take advantage of him. As it traditionally has in other representational relationships, particularly the attorney-client relationship, the law will provide redress for the employee who has been injured by breach of that duty by his union bargaining representative. Since the holding to this effect in *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192 (1944), the "duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of Federal labor law." *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967).

The analogy between the duty owed by the union is so close to that owed by attorneys as to make clear that the most appropriate State statute to borrow in a § 301 action is that dealing with legal malpractice. Like the union, which is the exclusive bargaining representative of all the employees in the unit by virtue of statutory provisions, the attorney has special status by operation of law. Just as the union is more knowledgeable than the individual employee is or could be with respect to the collective bargaining agreement, the lawyer is more knowledgeable than the layman-client as to the law. The very function, experience and special abilities of the union and the attorney in their respective spheres grant them the ability to inflict great harm on the individual they are representing. In both cases, the special legal status and superior knowledge of the representative put the individual in a position where he has no alternative but utterly to rely upon the representative.

In general, then, the identities in function are marked between the union and the attorney. And the individual being represented is in the identically vulnerable position in each case. The identities are most clear and dramatic in the particular context of the adversary proceeding, such as the arbitration involved in this case. To safeguard him from abusive and arbitrary treatment from his representative, whether union or attorney, an individual plainly needs and therefore receives at the hands of the law the same general protections.

The elements of proving the breach of the representational duties are the same in both cases. To establish the breach of the duty of fair representation, the plaintiff must show that his union did not represent his interests faithfully, but in fact dealt with him in a discriminatory or arbitrary fashion. Further, the plaintiff must show that the union's misconduct caused him damage. In particular, he must show that the employer breached the collective bargaining agreement, and that he would have obtained relief for that breach if the union had conducted itself towards him properly. Likewise, in a legal malpractice action, the plaintiff must prove not only misconduct by his attorney but also the damage flowing from that misconduct. He must establish that he would have won his case, if his attorney had represented him properly. In sum, he must make the same kind of showing as the plaintiff in a § 301 action.

Accordingly, as the Court below held, the appropriate statute in this case is the New York statute for nonmedical malpractice. The parameters and functions of the duty of fair representation as imposed on unions are so close to those representational duties which the attorney owes his client as to invoke that statute.

B. The State statute of limitations for an action to vacate an arbitration award is not the appropriate one for an action for the breach of the duty of fair representation. Both the claims involved and the relief sought in the two actions stand in positions of polar contrast, not comparability. While the claim in an action for the breach of the duty of fair representation is directed to the conduct of the union, the claim sought in an arbitration under the collective bargaining agreement addresses the conduct of the employer. In identically stark contrast, the relief sought in the litigation against the union is damages flowing from the union's breach of duty; in the arbitration, the relief sought is enforcement of the employer's obligations under the collective bargaining agreement. Particularly when the alleged breach of the duty of fair representation centers upon the union's conduct in the arbitration itself, as in this case, it could not possibly have been the subject of the arbitration, and the arbitrator could not possibly have provided any relief. Consequently, the State statute of limitations governing actions to vacate arbitration awards is not an appropriate limitations period to borrow.

United Parcel Service, Inc. v. *Mitchell*, 451 U.S. 56 (1981) ("*Mitchell*"), relied upon the identity in both the claim made and the relief requested in the § 301 suit against the employer and in the arbitration, for its holding that the period in the State statute for vacation of arbitration awards was the appropriate limitations period for suits against the employer. Under the tests established in *Mitchell*, the contrasts in the claims, and the utter unavailability in arbitration of the relief requested against the union in a § 301 suit for breach of the duty of fair representation, render the statute concerning vacation of arbitration awards quite inappropriate for the § 301 suit against the union.

II. A. There is no disagreement that the general rule prescribes that the appropriate State statute of limitations be applied to a Federal cause of action, when Congress itself has prescribed no such statute. This has been the rule followed by this Court since at least 1830, and applied to a variety of Federal rights. Most significantly, it has been applied to § 301 actions, in both cases in which the question has arisen, *Mitchell* and *International Union, UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966) ("*Hoosier*").

B. This Congressional intention is reflected also in like Congressional action with respect to other labor statutes—in particular, §§ 302 and 303 of the Labor Management Relations Act, 29 U.S.C. §§ 186 and 187 ("LMRA"); and Title I of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 411-415 ("LMRDA"), and the Section of the Postal Reorganization Act tracking § 301, 39 U.S.C. § 1208(b).

Congress put §§ 301, 302 and 303 in different Titles and Subchapters of LMRA from those dealing with unfair labor practices. Congress provided no statute of limitations for any of those three Sections. Court decisions involving §§ 302 and 303, as well as the decisions of this Court under § 301, have uniformly held that the appropriate State statute of limitations should be applied. That interpretation of Congressional intention is correct and should be likewise applied to § 301.

Courts have accorded a similar analysis to actions under Title I of LMRDA. That Title is designed to protect individuals from arbitrary abuse of power by unions, just as is the duty of fair representation. This Court has held that there is an identity of purpose between the two statutes. By 1959, decisions of this Court had made clear that the duty of fair representation extended beyond

Railway Labor Act unions to those certified under the LMRA. The apparent Congressional intention that State statutes of limitations apply to protect the individual with respect to his Title I LMRDA rights should likewise apply to § 301 suits by individuals claiming a breach of the duty of fair representation.

When the Postal Reorganization Act became law in 1970, Congress must have been well aware not only generally of the duty of fair representation and the many decisions of this Court enforcing it, but also specifically of the *Hoosier* decision that State statutes of limitations should govern in § 301 suits. Congress generally provided for collective bargaining in the postal service, and in particular enacted a provision which closely tracks § 301, 39 U.S.C. § 1208(b). That provision incorporates no statute of limitations. Plainly, Congress intended that the law should continue to be that the appropriate State statute of limitations should be applied in § 301 actions, including claims of a breach of a union's duty of fair representation.

C. In *Hoosier*, this Court rejected the precise contention urged by Petitioners in this case, that this Court should itself fashion a uniform Federal statute of limitations for § 301 actions, importing the six-month statute applicable to charges for unfair labor practices. The Court held that Congress knew of the general rule and must have intended that it be applied, when it did prescribe the six-month rule for unfair labor practices but included no statute of limitations with respect to § 301 actions. Congress intended that State statutes of limitations apply. The elucidation of the law in *Hoosier*, in which a union was plaintiff, is equally valid law when unions are defendants.

This Court likewise rejected the concept that administrative standards should be applied to § 301 suits alleging breach of the duty of fair representation, in its decisions

overruling the defense, proffered by union defendants in such actions, that enforcement of the duty of fair representation was preempted and should be left exclusively to the National Labor Relations Board. *Humphrey* v. *Moore*, 375 U.S. 335, 344 (1964); *Vaca* v. *Sipes*, 386 U.S. 171, 176-184 (1967). Particularly in *Vaca*, this Court set out the differences in function and scope between an unfair labor practice procedure for such breach and a Court action under § 301, and emphasized that the latter must be available to redress complaints on behalf of injured employees. Every pertinent decision of this Court thus stands in opposition to judicial establishment of a six-month limitation, and militates for adherence to the general rule, consistently followed in § 301 actions, that the appropriate State statute of limitations should be followed. Accordingly, the judgment below should be affirmed.

ARGUMENT

I. THE NATURE OF THE DUTY OF FAIR REPRESENTATION, SAFEGUARDING THE INDIVIDUAL FROM UNFAIR AND INJURIOUS TREATMENT BY HIS REPRESENTATIVE, MAKES THE MOST APPROPRIATE STATE LIMITATIONS PERIOD IN THIS CASE THAT FOR NONMEDICAL MALPRACTICE ACTIONS, AS THE COURT BELOW HELD.

A. The Nature Of The Duties Owed By The Union To Each Employee In The Bargaining Unit, And The Elements Of Proof Of Breach Of That Duty, Are So Similar To Those Of The Attorney-Client Relationship As To Make The New York Nonmedical Malpractice Statute Of Limitations The Appropriate One To Borrow.

1. The Nature Of The Duties Are Similar.

a. The duty of fair representation

From its inception, the duty of fair representaion reflected basic principles of justice and law requiring the

conclusion that Congress could not have intended to leave the individual employee without legal recourse when he was subjected to unfair treatment in his employment relationships as a result of conduct by his exclusive bargaining representative. As this Court held in the seminal case of *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192 (1944), in relation to the provisions of the Railway Labor Act providing for exclusive representation of all employees in the unit by the bargaining representative:

> "The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. *It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf*, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed." *Id.* at 202 (emphasis added).

While the bargaining representative in performing its duties may make agreements and take action which might have unfavorable impact on some of those in the bargaining unit, the conduct of the representative must be based upon "relevant differences" and not "irrelevant and invidious" considerations such as the race discriminations involved in that case. *Id.* at 203. The individuals being represented have a right to be free from such unfair treatment at the hands of their representative. "That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction." *Id.* at 207.

As originally announced in *Steele* and in *Tunstall* v. *Brotherhood of Locomotive, Etc.*, 323 U.S. 210 (1944),

decided the same day, the duty of fair representation is the fruit of "two separate taproots." One is the exclusive right to represent all employees granted the union by the statute. The other applies the general criteria of the law demanding that those who assume the role of representing others owe them the duty to not take advantage of them or deal with them unfairly. *Steele* assumed and held that "a union that acts as a bargaining representative of employees *owes to the employees it represents the duty owed by an agent to its principal and by a fiduciary to its beneficiary*" (emphasis added)."[1] "Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers." *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952).

"The union's duty to the employee is similar to attorney-client, trustee-beneficiary, director-stockholder, and other fiduciary relationships." Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned By His Union*, 41 U. Cinc. L. Rev. 55, 75 (1972). These traditional, long-standing legal principles, insistent upon protecting the individual from having his interests unjustly sacrificed, were of course well known to the Congress, and implicitly intended to apply to unions when they took upon themselves the representative's mantle.

This Court has recognized that the legal principles supporting the duty of fair representation, based as they were upon general standards of conduct for legal representatives, extended beyond the Railway Labor Act to the National Labor Relations Act. In a third decision

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[1] Summers, *The Individual Employee's Rights under the Collective Agreement: What Constitutes Fair Representation?* in THE DUTY OF FAIR REPRESENTATION, 60, 61 (McKelvey, Editor 1977).

announced the same day as *Steele* and *Tunstall*, before the Labor Management Relations Act had been enacted, this Court declared that a union, "[b]y its selection as bargaining representative . . . has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially." *Wallace Corp.* v. *Labor Board*, 323 U.S. 248, 255 (1944). "The union, then, is agent and attorney for the employees in the appropriate unit after it has been designated as bargaining agent." *North Electric Manufacturing Co.* v. *National Labor Relations Board*, 123 F.2d 887, 889 (6th Cir. 1941).

"Since that landmark decision [*Steele*], the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967). "To leave the employee remediless" in a situation when the breach of the statutory duty of fair representation has frustrated the individual employee's obtaining satisfaction in the grievance and arbitration procedure, "would, in our opinion, be a great injustice. We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract." *Id.* at 185-186.

b. The duties owed by an attorney to his client

As its very name denotes, the essence of the duty of fair representation owed by the union to each employee is representational. The union is bound to represent fairly the interests of the employees in the bargaining unit in dealing with their employer, particularly in the negotiation, administration and enforcement of the collective

bargaining agreements. In general, it appears indisputable that these are the same types of interests for which an individual retains an attorney. When he feels he needs advice with respect to his rights and obligations, an individual consults a lawyer. One of the particular contexts in which an individual typically seeks advice is when he becomes involved in the negotiation, administration and enforcement of contracts.

Both the union and the attorney are the beneficiaries of special status by operation of law, endowing them with representational rights and duties. The union is the exclusive bargaining representative by operation of federal law. Similarly, the attorney is licensed to his special position of unique capability of representing individuals in court and performing other legal duties, by virtue of state law.

Whether dealing with his union or his attorney, the individual being represented does not have the training, experience or presumed abilities of the party who is representing him, with respect to obtaining a disposition favorable to him of the problem confronting him personally. An employee scarcely has available the time or educational or other background ever to become as knowledgeable as his union about the terms and conditions of his employment, for the negotiation and administration of the collective bargaining agreement is the very purpose of the union's formation and existence, and the very essence of its daily activities. A glance at only the lengthy, complex grievance provision of the collective bargaining contract in this case, Joint Appendix ("A.") 14-31, shows how far it is beyond the ken of ordinary steelworkers.

The contract is itself a system of law; if the individual is to be adequately represented when his interests become embroiled in it, he surely requires professional assist-

ance. In this respect there is a marked identity between the union and the lawyer. The ordinary person has only limited knowledge of the law, and is hardly in a position to attain the special knowledge and capacities which an attorney brings to legal issues. If the ordinary individual is to be adequately represented in dealing with legal affairs, particularly in an adversary legal proceeding, he requires the assistance of an attorney. He looks to his attorney, just as in his employment relationships he looks to his union, for effective and fair representation.

When an attorney represents a class, he must represent all individuals and groups within that class without discrimination or hostility. *See, e.g., Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978).[2] This is closely analogous to the representational duties of the union, which likewise may have to confront and fairly resolve conflicts of interest among the employees it reprsents. *See, e.g., Ford Motor Company* v. *Huffman*, 345 U.S. 330 (1953); *Humphrey* v. *Moore*, 375 U.S. 335 (1964).

In the special context of an adversary proceeding, which is central to this case, the very close similarities between the union and the attorney are most conspicuous. Indeed, an impartial observer would scarcely

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[2] "The class itself often speaks in several voices. Where there is disagreement among the class members concerning an appropriate course of action, it may be impossible for the class attorney to do more than act in what he believes to be the best interests of the class as a whole. If the attorney's decision in the face of such disagreement affects each class member more or less equally, and no allegation is made that the rights of a definable minority group within the class were sacrificed for the benefit of the majority, the attorney's views must be accorded great weight, and the trial judge's decision to ratify the attorney's action will seldom be overturned." 576 F.2d at 1216.

be able to observe any difference between the responsibilities and conduct undertaken and evidenced by a union representing an employee in an arbitration, and an attorney representing a client in an arbitration, or in any other adversary proceeding for that matter. Certainly the attorney is held accountable to professional standards of fairness towards his client and devotion to his client's interests. At the very least, those standards undoubtedly include the duty to be free from that kind of discriminatory or antagonistic dealing with his client which is called for by the duty of fair representation.

2. The Elements Of Proof Of Breach Are Similar.

Just as the nature of the duties are essentially the same, so are the elements of proof of a breach of duty. In both cases, the plaintiff must prove not only that the representational duty owed him has been breached, but also that had there been no breach and his representation had been conducted fairly, he would have been successful in vindicating his claim. To prove a breach of the duty of fair representation directed to the conduct of the union in resolving disputes with the employer under the collective bargaining agreement, the plaintiff must demonstrate both that the union conducted itself unfairly against him and that this conduct damaged him. In the light of *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) *("Hines")*, *Mitchell* and *Bowen* v. *United States Postal Service*, 459 U.S. ____, 103 S. Ct. 588 (1983), it seems clear that an element of proof in a breach of the duty of fair representation case is the demonstration that the employer's breach of the contract would have been established if the union had not breached its duty to the plaintiff. In this case the complaint unmistakably alleges union conduct that would constitute a breach of duty of fair representation, inasmuch as, speaking generally, it

alleges the same type of union conduct in conducting an arbitration as was before this Court in *Hines*. A. 8-10.

Just as the plaintiff in a fair representation case must establish that the employer breached the contract, the client alleging failure to file in time, failure to prosecute properly, or similar professional conduct related to an adversary proceeding, must prove that he would have won the case had the attorney not breached his duty. *See, e.g., Garguilo* v. *Schunk*, 58 A.D.2d 683, 395 N.Y.S.2d 751 (1977); *Carpenter* v. *Weichert*, 51 A.D.2d 817, 379 N.Y.S.2d 191 (1976).

"Proving that he suffered a real injury from the attorney's conduct is often the client's most difficult task. He must virtually re-litigate a case that has already been decided against him and show that the earlier judgment was an erroneous result caused by his attorney's negligence. This 'rehearing' is not, however, a collateral attack on the judgment, since the winning party in that suit is not affected by the client's present action against his attorney." Leavitt, *The Attorney As Defendant*, 13 Hastings L.J. 1, 29 (1961).

The feature of requiring proof involving a third party as a condition of success for the plaintiff in litigation is not unique to these cases. To hold a trustee liable for dereliction of duty in prosecuting, collecting or defending a beneficiary claim, for example, the beneficiary must show that the action which it is alleged the trustee should have taken would have been successful in protecting the beneficiary's interests. *See, e.g.*, 2 *Scott on Trusts* §§ 177-178 (3rd ed. 1967).

These considerations demonstrate the essential identity between the representational relationship between the union and the employee, and that between the attorney

and his client. These similarities are so close between the nature of the duty, and the elements required to establish its breach, as to provide ample basis for affirmance of the judgment below. The New York statute of limitations applicable to nonmedical malpractice is indeed the most appropriate one to borrow.

B. A State Statute Of Limitations Applicable To Actions To Vacate An Arbitration Award Is Inappropriate For Actions For Breach Of The Duty Of Fair Representation By A Union.

The Court below would have committed clear error had it selected the State statute providing a time limit for suits to vacate arbitration awards. There is no similarity between the claim asserted and the relief requested in an action for breach of the duty of fair representation against a union under § 301 and those in the arbitration proceeding between the union and the employer under the collective bargaining agreement. The claim asserted in the fair representation action is breach of the duty owed by the union to the individual employee. That is certainly not the claim in the arbitration. There the union is asserting a breach of the collective bargaining agreement by the employer.

In the § 301 action by the individual against the union, the relief sought is damages arising from the union's breach of the duty of fair representation. In the arbitration, the relief sought flows from the employer's breach of the collective bargaining contract.

If the employer is not a party to the action for breach of the union's duty of fair representation, the relief which might have been obtainable in arbitration, had the union conducted itself properly, may no longer be obtainable. But there is no need to join the employer to hold the union accountable for the damages which have resulted from its

misconduct. *Vaca* v. *Sipes*, 386 U.S. 171 (1967), provides sufficient illustration of an action brought solely against the union for breach of its duty of fair representation. "If both the union and the employer have independently caused damage to employees, the union cannot complain if separate actions are brought against it and the employer for the portion of the total damages caused by each." *Czosek* v. *O'Mara*, 397 U.S. 25, 29 (1970). *Bowen* v. *United States Postal Service*, 459 U.S. ____, 103 S. Ct. 588 (1983), provides sufficient illustration for assessment of damages against only the union; as the union had not taken the case to arbitration, there appeared no possibility of obtaining the relief which would have been attained in a successful arbitration, the plaintiff's reinstatement to his job.

In any event, the employer's breach *vel non* would be established upon the basis of the record in the fair representation case. That would almost inevitably be a quite different record from that in the arbitration, and one far more favorable to the employee. After all, the crux of the allegations in this case, as in *Hines*, is precisely the union's misconduct at the arbitration, in deliberately failing to avail itself of the ready means to make a record in arbitration most favorable to the employee.

The conduct which is the subject of the arbitration is the conduct of the employer, which occurred long before the arbitration proceeding. The conduct to be tried in this case against the union is breach of the duty of fair representation at the arbitration hearing. Obviously, it did not arise, and could not possibly have arisen, prior to the arbitration. Certainly the issue of breach of the duty of fair representation was not before the arbitrator. It would not be possible for the arbitration award to decide anything about it. And in fact the award at bar is entirely

confined to the collective bargaining agreement, and decides—and implies—absolutely nothing with respect to the relationship between Respondents and their union representatives who conducted the arbitration of the claimed breach by their employer of the contract which directly affected them. A. 62-67.

These hard, objectively irrefutable facts demonstrate that *Mitchell* did not reach and should not be extended to an action against a union for breach of the duty of fair representation. *Mitchell* was confined to the employer and rested upon the identity of claim and relief as against the employer. Plaintiff in that case raised "the same claim" that was raised, and sought "the same relief" that was sought, in the arbitration proceeding. 451 U.S. at 61. That simply cannot be said of the action for breach of the duty of fair representation.

While *Mitchell* held that an element of the § 301 claim against the employer was proof that the union had breached its duty of fair representation, this discussion and holding were entirely in the context of a suit against the employer. The "arbitration award stands between the employee and any relief which may be awarded against the *company*." 451 U.S. at 63, n.4 (emphasis added); and *id.* at 71, 75, n.7 (Opinion of Justice Stevens, concurring in part and dissenting in part). In *Mitchell*, as it had in *Hines*, the Court held that the arbitration award would bar a § 301 action against the employer, unless the breach of duty on the part of the union could be shown. But that does not change the nature of the duty of fair representation or the proof required to establish its breach. That is and remains different from the nature of the duty and of the proof in an action against the employer.

In short, the focus and substance of this action for breach of the duty of fair representation are so different

from those in a suit to vacate an arbitration award that there appears no support for selecting the State statute applicable to the latter as the appropriate limitations period. The fair representation action is indeed close to a suit for nonmedical malpractice. That is the appropriate State statute of limitations which should be borrowed under the circumstances of this case.

II. THE LAW IS CLEAR AND WELL FOUNDED THAT WHEN CONGRESS HAS NOT SPECIFICALLY PROVIDED A STATUTE OF LIMITATIONS FOR A FEDERAL CAUSE OF ACTION, THE APPROPRIATE STATE STATUTE GOVERNS.

A. This General Rule Is Well Established And Has Been Followed, Apart From § 301 Actions.

There is no question that the general rule is that the appropriate limitations period of the State in which the suit is being litigated will govern when Congress has prescribed no limitations period for a suit upon a Federal cause of action. Based from its inception upon the Congressional prescription in the Rules of Decision Act, now 28 U.S.C. § 1652, that rule has been consistently recognized and respected by this Court for over 150 years.

The Rules of Decision Act has been essentially unchanged since the original Judiciary Act of 1789. In its present form, it provides "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." Based upon this statute, this Court in 1830 tested the timeliness of an action against the Register of a United States land office for failure to perform his duty by reference to the general State statute of limitations. *M'Cluny* v. *Silliman*, 3 Pet. 270. Since then, the rule has been

applied over the years to a variety of different Federally created rights. *Campbell* v. *City of Haverhill*, 155 U.S. 610 (1895) (patent infringement); *McClaine* v. *Rankin*, 197 U.S. 154 (1905) (action against shareholder of national bank); *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906) (Sherman Act); *O'Sullivan* v. *Felix*, 233 U.S. 318 (1914) (Civil Rights Act of 1870); *Cope* v. *Anderson*, 331 U.S. 461 (1947) (National Bank Act); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) (Civil Rights Act of 1866); *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980) (Civil Rights Act of 1871).

The "adoption of state statutes seems so well established that the failure to designate a limitation period has been said to indicate a congressional intention that state law be applied." Note, 76 Harv. L. Rev. 1306, 1307 (1963).

B. This General Rule Has Been Adhered To In § 301 Actions.

This general rule has been applied by this Court to actions based upon § 301 of LMRA, in both cases in which it has arisen. *International Union, UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966); *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56 (1981). In the former case, which was a suit by a labor organization against an employer for breach of a collective bargaining agreement,[3] the Court reviewed and relied upon the general rule. 383 U.S. at 703, 707. The Court was confronted with, and rejected, the contention that it should judicially establish one standard of timeliness for § 301

[3] While the Court in so many words confined its decision to that situation, 383 U.S. at 705, n. 7, it is respectfully submitted that the rationale embraces the action involved here, as is shown in the discussion in this paragraph of the text and also pp. 29-33, *infra*.

suits, which would be uniform in its application throughout the United States. *Id.* at 701-704. In particular, this Court expressly rejected the suggestion, which has nevertheless again been proffered by Petitioners in this case, that the presence of the six-month limitation governing unfair labor practices should be viewed as a talisman that Congress meant for the judiciary to engraft that limitation upon § 301 actions. Precisely to the contrary, this Court held that Congress must have intended that the general rule should apply to § 301 actions, when it provided no limitations period for Court suits based upon § 301 and at the same time establishing a six-month limitation period for charges of unfair labor practice filed with the National Labor Relations Board; thus Congress intended that the most appropriate State limitations period would govern. *Id.* at 703-704. Congress must have known of the well-established and long-honored general rule; and expected that it would result in the application of the most appropriate State statute in § 301 suits.

Mitchell likewise adopted a state limitations period for a § 301 action against an employer. Indeed, the issue to be decided was held to be "which state statute of limitations period should be borrowed and applied to an employee's action against his employer under § 301(a) of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. § 185(a), and *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976)." 451 U.S. at 58. The Court relied upon and followed the *Hoosier* holding that " 'the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." 451 U.S. at 60, quoting *Hoosier*, 383 U.S. at 704-705.

C. Congress Has Evidenced Its Intention That State Limitations Periods Be Applied To Actions Under § 301, By Not Enacting A Uniform Federal Limitation Period In Related Provisions Of LMRA And In Other Labor Laws.

The omission of a statute of limitations from § 301 reflects a Congressional intention that State limitations periods should apply, rather than an implicit direction or invitation to this Court itself to establish a Federal one. This conclusion is impelled not only by the general rule and the decisions adhering to it and applying it to § 301, discussed above, but also by the identical Congressional action of omitting any limitations periods in (1) §§ 302 and 303 of LMRA, (2) Title I of LMRDA, and (3) § 1208(b) of the Postal Reorganizaton Act, 39 U.S.C. § 1208(b) (1976).

1. The Statutes Of Limitation Treatment Of §§ 302 And 303 Should Be Accorded To Suits Against The Union.

When Congress enacted the Labor Management Relations Act of 1947, it drew a clear line of legislative demarcation between amendments to the National Labor Relations Act, including the imposition of the six-month limitation, and § 301 and its contiguous provisions, §§ 302 and 303. Congress knowingly placed them in separate titles. Title I dealt with the amendment of the National Labor Relations Act. 61 Stat. 136 (1947). With the intervening enactment of Title II dealing with conciliation of labor disputes and national emergencies, 61 Stat. 152 (1947), Congress lodged § 301, together with only two following Sections, in Title III, which it labeled, "SUITS BY AND AGAINST LABOR ORGANIZATIONS." 61 Stat. 156 (1947). As now codified in Chapter 7, "LABOR MANAGEMENT RELATIONS" of Title 29 of the United States Code, the six-month provision appears in Subchapter II, entitled "NATIONAL LABOR RELA-

TIONS." 29 U.S.C. pp. 713, 723 (1976). Contrastingly, § 301 appears with §§ 302 and 303, in Subchapter IV, entitled, "LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT." 29 U.S.C. p. 735 (1976). As this Court has held in actions under § 301, Courts have consistently applied the State statute of limitation considered most analogous in actions under the other Sections, 302 and 303, which were enacted and placed by Congress together with § 301.

a. Section 303

Section 303 is especially instructive as to the Congressional intention, because it in terms provides for a suit against the union on a claim which can be established only by reference to an unfair labor practice; and it also makes explicit reference to § 301. Subsection (a) of § 303 makes it unlawful "for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title."[4] And Subsection (b) grants a right of suit "in any district court of the United States subject to the limitations and provisions of section 185 of this title [§ 301] without respect to the amount in

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[4] Section 303 has been worded this way since 1959, as amended in the Labor-Management Reporting and Disclosure Act. Pub.L. 86-257, §§ 704-705 (1959). As enacted in 1947, § 303(a) specified the conduct subject to suit, in terms similar to § 8(b)(4) of the LMRA. Section 8(b)(4) was itself amended in the LMRDA. In terms of the statute of limitations, the amendments do not appear pertinent. For example, in *Hyatt Chalet Motels, Inc.* v. *Carpenters Local 1065*, 430 F.2d 1119 (9th Cir. 1970), which arose after the Section had been amended, the Ninth Circuit adhered to the holding in *International Union of Operating Engineers* v. *Fischbach and Moore*, 350 F.2d 936 (9th Cir. 1965), *cert. denied*, 384 U.S. 904 (1966), which arose under the earlier language of § 303; *Fischbach and Moore* is discussed in the text. *See* p. 23, *infra*.

controversy, or in any other court having jurisdiction of the parties. . . ."

In the light of this Congressional bonding of §§ 301 and 303, surely some Court would have held that the six-month unfair labor practice limitation would be applicable to § 303 claims, if there were any validity to Petitioners' position that the six-month administrative limitation should be applied to § 301 suits. Such a result might also seem to flow from the Congressional prescription that suit under § 303 should be "subject to the limitations and provisions of section 185 of this title." In fact, however, the administrative limitation has not been applied to § 303 suits, even though that Section in terms defines the cause of action as equivalent to an unfair labor practice.

In the decisions under § 303, there has been no suggestion that any statute of limitations would apply other than the appropriate State statute. Indeed, it was accepted by both parties, and implicitly accepted by this Court, that the State statute applicable to actions for injuries to person or property would be applicable to a § 303 suit, in *United Mine Workers of America* v. *Railing*, 401 U.S. 486 (1971), vacating and remanding to determine when the cause of action accrued, *Railing* v. *United Mine Workers of America*, 429 F.2d 780 (4th Cir. 1970). As the Court of Appeals held, indicating that there was no challenge to the District Court's ruling:

> "Section 303 of the Labor Management Relations Act contains no statute of limitations. The district court referred to state law to determine the pertinent period of limitation to be applied." 429 F.2d at 781.

In doing so, the District Court relied upon the general rule. *Railing* v. *United Mine Workers of America*, 276 F. Supp. 238, 241 (N.D.W.Va. 1967).

Likewise, in *International Union of Operating Engineers* v. *Fischbach and Moore*, 350 F.2d 936 (9th Cir. 1965), *cert. denied*, 384 U.S. 904 (1966), the Court considered whether the six-month limitation period in § 10(b) should be applied to § 303 cases. After acknowledging that there were considerations which might support judicially decreeing such a limitation, the Court declared:

> "But while we are tempted by Mr. Justice Douglas's appeal for 'judicial inventiveness', made in Textile Workers Union v. Lincoln Mills, [citations], we cannot adopt that phrase as a shibboleth to justify the pronouncement of a rule which would seem to be meet only for congressional action. In fact, *the very presence of a six-month limitation period in § 10(b) and the absence of any period of limitation in § 301, 29 U.S.C. § 185, and § 303 makes us more certain of our duty of forbearance.*
>
> * * *
>
> "The fact is that Congress has remained silent on the matter of a limitations period applicable to § 303, and it does not appear that the omission was unintentional or intended to require 'judicial legislation.' Unlike many facets of state law *state statutes of limitations are commonplace and familiar to Congress, which, cognizant of the general federal rule, cannot be presumed to have expected the courts to skirt it.*" 350 F.2d at 938, 939 (emphasis added).

Other cases in which the reference to a State statute of limitations for § 303 claims was recognized as in effect so clear as to be indisputable include: *Consolidated Express* v. *New York Shipping Association*, 602 F.2d 494 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980); *United Mine Workers of America* v. *Meadow Creek Coal*, 263 F.2d 52 (6th Cir. 1959); *Kipbea Baking* v. *Strauss*, 68 LRRM 2397 (E.D.N.Y. 1968), *aff'd*, 411 F.2d 467 (2d Cir.

1969); *Peterson* v. *Musicians, Local 802*, 82 LRRM 2144 (S.D.N.Y. 1972) (rejecting the contention that the § 10(b) period should be applied).

b. Section 302

Like the decisions involving § 303, those involving § 302 have applied State statutes of limitations, and recognized that State statutes should be applied to §§ 301 and 303, as well as § 302.

In *Daniel* v. *International Brotherhood of Teamsters*, 410 F. Supp. 541, 554 (N.D.Ill. 1976), *aff'd on another issue*, 561 F.2d 1223 (7th Cir. 1977), *rev'd on another issue*, 439 U.S. 551 (1979), for example, the District Court held as follows:

> "Although the issue of whether a state statute of limitations should be applied in a federal court suit under section 302(e) has not been decided, state limitation periods have been applied in federal court suits under sections 301 and 303 of the NLRA." *Hoosier* and *Fischbach and Moore* were cited.

State limitations periods were applied in § 302 suits also in *Valle* v. *Joint Plumbing Industry Board*, 623 F.2d 196, 202, n.10 (2d Cir. 1980); *Morgan* v. *Laborers Pension Trust Fund*, 433 F. Supp. 518, 526 (N.D.Cal. 1977) ("Because neither section [301 nor 302] contains a specific statute of limitations, the Court must look to the most appropriate period of limitation provided for by California law").

2. Decisions Under Title I Of LMRDA, Which Has The Same General Purpose As The Duty Of Fair Representation, Protecting Individuals Against Unfair And Arbitrary Exercise Of Power By Unions, Are Also Probative That Congress Intended That State Statutes Of Limitations Should Apply In § 301 Actions.

Like the duty of fair representation, the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. §§ 401 *et seq.* (1976) ("LMRDA"), provides remedies for unfair treatment of individuals by unions. While in terms addressing the union-member relationship, Congress was obviously concerned with the impact of unfair union conduct in that relationship upon interstate commerce and the employment relationship.[5] In its declaration of findings, purposes, and policy in the LMRDA, Congress included the following:

> "[I]n order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.
>
> * * *
>
> "The Congress, therefore, further finds and declares that the enactment of this Act is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor

[5] Respondents were members of Petitioner Unions, A. 6. They were required to be, by virtue of Article III, Section 2(a) of the Agreement between the Bethlehem Steel Corporation and Petitioner International.

> Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended. . . ." LMRDA, §§ 2(a), (c), 73 Stat. 519 (1959), 29 U.S.C. §§ 401(a), (c) (1976).

In particular, Title I of LMRDA, entitled "BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS," 29 U.S.C. §§ 411-415 (1976), patently means to insure that the individual is treated fairly, particularly with respect to participation in union affairs and effectively expressing his views regarding union policies, certainly including those involved in collective bargaining units. That Title established duties which are kindred to those encompassed by the duty of fair representation.

This kinship has been recognized by this Court:

> "It was because the national labor policy vested unions with power to order the relations of employees with their employer that this Court found it necessary to fashion the duty of fair representation. That duty 'has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal law.' *Vaca* v. *Sipes*, 386 U.S. 171, 182. For the same reason Congress in the 1959 Landrum-Griffin amendments, 73 Stat. 519, enacted a code of fairness to assure democratic conduct of union affairs by provisions guaranteeing free speech and assembly, equal rights to vote in elections, to attend meetings, and to participate in the deliberations and voting upon the business conducted at the meetings." *National Labor Relations Board* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 181 (1967).

Because it was dealing with the identical national labor policy reflected in the duty of fair representation, Congress in 1959 had ample opportunity to specify a Federal statute of limitations if it had intended that one be

attached to violations of that duty. Obviously, Congress was aware of the interrelationships between the NLRA and LMRDA. Indeed, LMRDA enacted amendments to the NLRA. *See, e.g.*, n. 4, p. 21, *supra*. Some of them attached time limits or time definitions. By 1959, the duty of fair representation, which had been enunciated by this Court in 1944, had already been applied to unions certified under the National Labor Relations Act. *Syres* v. *Oil Workers*, 350 U.S. 892 (1955); *Ford Motor Company* v. *Huffman*, 345 U.S. 330 (1953). Consequently, there is quite persuasive if not dispositive significance in the fact that Congress enacted no statute of limitations with respect to suits under Title I of LMRDA. The unavoidable inference is that Congress intended that the appropriate State statute of limitations should apply to actions alleging unfair treatment of individuals by unions.

> " 'To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration.' " *Allis-Chalmers, supra*, at 194, quoting *Labor Board* v. *Drivers Local Union*, 362 U.S. 274, 291-292 (1960).

The views of subsequent Congresses "are entitled to significant weight . . . particularly so when the precise intent of the enacting Congress is obscure." *Seatrain Shipbuilding Corporation* v. *Shell Oil Company*, 444 U.S. 572, 596 (1980).

Courts have been unanimous in finding that State statutes of limitations must be applied to Title I LMRDA actions because Congress did not impose any Federal statute. These decisions include: *Copitas* v. *Retail Clerks International Association*, 618 F.2d 1370 (9th Cir. 1980);

Howard v. *Aluminum Workers*, 589 F.2d 771, 774 (4th Cir. 1978); *Dantagnan* v. *I.L.A. Local 1418*, 496 F.2d 400 (5th Cir. 1974); *Sewell* v. *Grand Lodge of International Association of Machinists*, 445 F.2d 545 (5th Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972); *Harrison* v. *AFL-CIO*, 452 F. Supp. 102 (E.D.Pa. 1978); *Berard* v. *General Motors*, 493 F. Supp. 1035 (D.Mass), *aff'd mem.*, 657 F.2d 261 (1st Cir. 1980), *cert. denied*, 451 U.S. 987 (1981); *Woods* v. *Local Union Number 613, IBEW*, 404 F. Supp. 110 (N.D.Ga. 1975).

3. The Congressional Intention That State Statutes Apply Is Likewise Reflected In The Lack Of A Uniform Federal Statute For Suits Under 39 U.S.C. § 1208(b), Which Tracks § 301.

In the Postal Reorganization Act of 1970, 84 Stat. 719, Title 39, U.S.C. (1976), which was a comprehensive overhaul of the country's Postal Service, Congress provided for the right of Postal employees to engage in collective bargaining. By 1970, there had been a number of decisions by this Court on the duty of fair representation, including *Hoosier*, which squarely addressed and decided a § 301 limitations issue in terms of the most appropriate State statute. In authorizing suits applicable to the employment relationship in the Postal Service, Congress virtually copied § 301, in 39 U.S.C. § 1208(b). That Section contains no statute of limitations. There is no conclusion reasonably to be drawn other than that Congress intended and expected that the statute of limitations applicable to suits for breach of the duty of fair representation by unions with collective bargaining agreements with the United States Postal Service would be the appropriate State statute.

D. Every Pertinent Decision Of This Court Rejects Adoption Of The Six-Month Limitations Period Proffered By Petitioners.

By no means are Petitioners the first to urge this Court to foresake the general rule for § 301 actions, and instead mobilize judicial creativity to impress those actions with the six-month unfair labor practice limitations period. Precisely that contention has been before the Court and rejected on a number of occasions. This Court rendered that judgment most directly and indistinguishably in *Hoosier*. Moreover, it elucidated the law to identical effect also in the series of cases rejecting the plea of preemption in § 301 suits brought by individuals.

Like the Petitioner Unions in this case, the union in *Hoosier:*

> "contends that this suit cannot be barred by a statute of limitations enacted by a State. We are urged instead to devise a uniform time limitation to close the statutory gap left by Congress. But the teaching of our cases does not require so bald a form of judicial innovation." 383 U.S. at 701.

As discussed above, see pp. 18-19, this Court in *Hoosier* was met with the same type of arguments as to the need for uniformity and the prevention of different decisions in different forums as Petitioners are urging here. *See, e.g.*, Brief of Petitioners ("Pet. Br.") 7-8, 21.[6] While Petition-

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[6] The realism of Petitioners' implication that swift clarification of the law of the shop is needed by them may be tested by their leisurely processing of Respondents' grievances. *Compare* the tones, *e.g.*, of Pet. Br. 17 *with* the reality of the history recited at A. 62. In any event, arbitration decisions are directed only to the particular grievances. Conceptually, they do not constitute binding precedent for subsequent arbitrations. There is no provision in the arbitration clause at bar reflecting agreement that *res judicata* or *stare decisis* principles should be applied to their arbitrations.

ers' attempts to distinguish *Hoosier* are far from clear, they appear to be predicated upon the notion that a § 301 case involving the grievance procedure is different from other § 301 cases for breach of the collective bargaining agreement or to enforce the provisions of the agreement. *See, e.g.*, Pet. Br. 12, n.4. There is not the slightest support for this in *Hoosier* or in the Congressional provisions or purposes.

Hoosier arose out of a dispute between a union and an employer over interpretation of their collective bargaining agreement. This Court held that there was no "need for uniformity" for such a suit because it did not "threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it." 383 U.S. at 702. In *Hoosier* the collective agreement had already been formed, and that the controversy before it was as to its interpretation. Identically here, the consensual process of arbitration has already taken place; this is not a suit to enforce that obligation. The assertion that the Union engaged in misconduct in this particular arbitration under this collective bargaining agreement does not "threaten the smooth functioning" of arbitration under this collective bargaining agreement, any more than the suit in *Hoosier* for interpretation of the contract affected the process by which that contract was formed. As *Hoosier* recognized, "[f]or the most part, statutes of limitations come into play only when these processes have already broken down." 383 U.S. at 702. *Hoosier* thus rejected what appears to be a purported foundation for Petitioners' argument, that the breaking down or malfunctioning of the process of negotiation or arbitration in a particular case musters support for the conclusion that there ought to be a uniform Federal statute of limita-

tions imported from unfair labor practice processes, procedures and provisions.

The language of § 301 includes no such distinction as Petitioners seek to draw between breach of duty suits after an arbitration concerning the union's conduct of the arbitration, and other suits based upon that Section. The language and intention of § 301 likewise admit of no such segregation. Plainly, the intention of Congress was to establish jurisdiction in the Federal Courts over all suits against employers or unions arising out of the collective bargaining and employment relationships. "Section 301 contemplates suits by and against individual employees as well as between unions and employers. . . ." *Hines*, 424 U.S. at 562.[7]

The aura of special, self-serving pleading infects the futile attempts of Petitioners to distinguish *Hoosier*, in which a union was plaintiff in a suit to enforce a collective bargaining agreement under § 301, from cases where individuals are plaintiffs suing either a union for breach of the duty of fair representation, an employer for breach of the collective bargaining agreement, or both. If the six-month limitation should not apply to the former suit, as *Hoosier* held it should not, it likewise should not apply in the latter. The issue of the statute of limitations under § 301 should not be treated as an elevator, depending upon whether the union is on the up or down side of the litigation caption.

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[7] Petitioners' attempts to question § 301 jurisdiction in suits by employees against the union representative are thus illusory. Pet. Br. 13-14, n. 5. Equally illusory is the purported distinction between "statutory" and "contractual" duties, *id.*, for § 301 is the statute which establishes jurisdiction to enforce against unions the duties they owe employees by being able to enter into, and entering into, contractual relationships.

In addition to the square holding in *Hoosier*, there is unmistakable rejection of Petitioners' contention in the decisions which have rejected the plea of preemption. Unions have resisted fair representation suits on the ground that they were arguably unfair labor practices, so that the exclusive remedy should be an unfair labor practice charge, subject to the six-month limitation. This Court has repeatedly rejected such a plea. *Humphrey* v. *Moore*, 375 U.S. 335, 344 (1964); *Vaca* v. *Sipes*, 386 U.S. 171, 176-184 (1967); *cf. Smith* v. *Evening News Association*, 371 U.S. 195, 196-198 (1962).

In *Vaca*, the Court emphasized that the nature and function of the duty of fair representation are to protect the individual employee. Treating a breach of that duty as an unfair labor practice would be insufficient because the Board had to be concerned with its view of the public interest, rather than safeguarding the interests of each individual employee; and an individual would not be able to obtain judicial review if the General Counsel of the Board elected not to proceed. If Courts would be "foreclosed by the NLRB's *Miranda Fuel* decision from this traditional supervisory jurisdiction [reflected in the duty of fair representation], the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint. . . ." *Id.* at 182. "The public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies." *Id.* at n.8. But the principles of justice and law embodied in the duty of fair representation are so deep rooted that the Courts should be open to all who allege a breach of that duty, including "complaints on behalf of injured employ-

ees where the injury complained of is 'insubstantial.'" *Ibid.*[8]

Now to sustain Petitioners' plea for the six-month period would thus require this Court to turn its back on a long, consistent line of its own decisions. It would not be conformable with the decisions and the rationale in *Hoosier*, nor with the similar reasoning in the preemption cases. In addition, it could not be reconciled with the long-established rule that when Congress did not itself prescribe a statute of limitations for a Federal right, this Court will not march in to decree such a Federal statute in lieu of Congressional action, but will apply the most appropriate State period. There is no justification here for creating a Federal standard. "Unlike federal borrowing, state borrowing is well-defined by usage and today provides the general rule for limiting otherwise unlimited federal actions." Note, *Limitation Borrowing in Federal Courts*, 77 Mich. L.Rev. 1127, 1134 (1979).

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[8] When Congress provides "two different remedies" that is strong evidence "that the remedies provided were to be independent of each other." *International Longshoremen's & Warehousemen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237, 244 (1952) (unfair labor practice charge and § 303 suit). *See also, e.g., Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) (when Congress provides two different remedies, the conclusion must be that they are "separate from and independent of" each other, *id.* at 466).

CONCLUSION

For the reasons stated herein, the judgment below should be affirmed.

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